(2) The judgment in default is entered for sums in excess of that claimed in the statement of claim.

At the material time the third defendant was a director of the first defendant, and together with another director, the second defendant, had given two separate personal guarantees that they will repay within two days of demand all moneys which shall be due to the plaintiff in consideration of the plaintiff making or continuing advances or giving or continuing credit or banking facilities to the first defendant. The limit of the first guarantee dated 17 July 1984 is $285,000 whilst that of the second guarantee dated 24 January 1985 is $150,000.

As at the date of the first guarantee, the plaintiff had already approved banking facilities to the first defendant in the form of a term loan for $90,000 which was disbursed on 10 July 1984 and an overdraft facility of $150,000 which was advanced from time to time. The terms and conditions for these facilities are contained in a letter of offer dated 12 June 1984.

On 4 January 1985, the plaintiff further approved the first defendant's application for a temporary excess overdraft of $150,000 over the $150,000 granted earlier. This was followed on 25 January 1985 by the plaintiff granting another temporary overdraft of $40,000 to the first defendant. A day before that, the second guarantee was executed.

The consideration for both guarantees is stated in the preamble of the guarantees as follows:

> In consideration of your (ie the plaintiff) making or continuing advances or otherwise giving or continuing credit or making banking facilities (including the issue of guarantee by you) to Fast Travel (M) Sdn Bhd hereinafter called the principal, we jointly and severally guarantee ...

A continuing guarantee such as the one in this case has been held in the case of *Heng Cheng Swee* v *Bangkok Bank Ltd*[1] to include guaranteeing not only facilities existing at the time of the execution of the guarantee but also facilities to be made in the future. As such there is good consideration given to both the continuing guarantees. A continuing guarantee is quite unlike the guarantee that was decided in the case of *Chew Soon Tat* v *Malaysia National Insurance Sdn Bhd*[2] and the one considered in *Perwira Habib Bank Malaysia Bhd* v *Foo Ah Chai*.[3] They are not continuing guarantees.

Clause 8 of both guarantees contains similar provisions and are very much akin to the conclusive evidence clause that was decided in *Citibank NA* v *Ooi Boon Leong & Ors*.[4] The effect of such a clause is that any statement issued by the plaintiff as to the amount due from the first defendant is conclusive evidence of the third defendant's indebtedness as a guarantor. Such a statement was issued by the plaintiff on 11 April 1988, wherein the principal is stated to be $426,861.45 which is less than the total limits of the two guarantees.

The two rates of interest claimed at 9% and 16.5% pa are the agreed and permissible rates of interest under the letter of offer dated 12 June 1984 as the first defendant had also permitted the plaintiff, at its discretion, to raise the interest from 9% to 16.5% pa under the letter of offer.

Lastly, the third defendant had also dragged his feet to get his application disposed of as soon as possible. The judgment in default was entered on 31 December 1986 and the third defendant was notified of it by letter dated 30 April 1987. The application to set aside was filed on 3 May 1987 after which the plaintiff had issued a writ of seizure and sale dated 5 May 1987 and the instant application was fixed for hearing on 26 October 1987. At the instance of the third defendant, the application was postponed twice before it finally came before me on 13 April 1988, by which time, the third defendant's premises had already been attached on 4 April 1988. There can be no doubt whatsoever that the third defendant's tardiness in pursuing his rights had greatly prejudiced the plaintiff as it had incurred expenses in executing the judgment.

The fact of this delay coupled with the all-important consideration that there are no merits to the defence, prompted me to dismiss the third defendant's application to set aside the judgment in default of appearance dated 31 December 1986, with costs.

Order accordingly.

Solicitors: *KL Wong & Co*; *Mah-Kok & Din*.

Reported by *Ng Sheau Jiuan*

Mohammad bin Baee v Pembangunan Farlim Sdn Bhd

HIGH COURT (TEMERLUH) – CIVIL SUIT NO 130/85
KC VOHRAH J
16 JULY 1988

Contract – Sale of house by housing developer – Non-delivery of house – Breach of sale and purchase agreement – Housing developer under receivership – Whether specific performance should be granted – Specific Relief Act 1950, ss 11, 20, 21

Companies and Corporations – Defendant company in receivership – Whether specific performance should be granted – Personal liability of receiver – Companies Act 1965, s 183

On 13 January 1979, the plaintiff entered into a sale and purchase agreement with the defendant company, a housing developer, to purchase in a housing estate which the defendant company was developing a lot together with a single-storey house to be erected thereon. The defendant expressly covenanted and agreed that the construction of the house would be

completed and be ready for delivery to the plaintiff within 18 months from the date of execution of the agreement, ie on or before 13 July 1980. The plaintiff filed his writ on 15 January 1985 and even by that date the house was not ready. The plaintiff claims specific performance of the agreement, the delivery of vacant possession of 'a complete house' in the housing estate, and liquidated damages. The plaintiff also claims special damages, and or alternatively damages for breach of contract, and costs. The defendant filed its defence. The plaintiff took out a summons to strike out the defence and for final judgment to be entered against the defendant for the reliefs claimed. On the date of the hearing of the summons, counsel for the defendant conceded there was no defence to the claim but disputed the right of the plaintiff to specific performance, liquidated damages and special damages as claimed.

Held: (1) If specific performance is granted, that would entail the receiver having to employ contractors to complete the house, incurring personal liability on the part of the receiver under s 183 of the Companies Act 1965 (Revised 1973). Failure on the receiver's part to complete the plaintiff's house, which in effect means failure on the receiver's part, would open the receiver to being in contempt of court and it would be wrong for the court to order specific performance in the circumstances.

(2) The facts show that the contract cannot be specifically enforced as the court will not be able to superintend the works required to complete the house. It is futile merely to order the completion of the house on the lot and the transfer of the property to the plaintiff; all that he would get would be the shell of a house, not fit for human habitation and of no commercial value so long as the housing estate remains uncompleted.

(3) The remedy lies in damages for breach of contract. The plaintiff succeeds in his claim with costs save that this is not a proper case for granting specific performance.

Cases referred to

1 *Macleod* v *Alexander Sutherland Ltd* [1977] SLT 44 (folld)
2 *Freevale Ltd* v *Metrostore (Holdings) Ltd & Anor* [1984] 1 All ER 495 (distd)
3 *Tengku Farid bin Tunku Hussain & Ors* v *United Asian Bank Bhd* [1985] 2 MLJ 199 (refd).

Legislation referred to

Companies Act 1965 (Revised 1973) s 183
Specific Relief Act 1950 (Act 137) ss 11, 20(1)(b), 21

Shamsudin bin Hj Nawawi for the plaintiff.
TK Leong for the defendant.

Cur Adv Vult

KC Vohrah J: On 13 January 1979, the plaintiff entered into a sale and purchase agreement with the defendant company, a housing developer, to purchase in a housing estate which the defendant company was developing, a lot therein, lot no 76, together with a single-storey house to be erected thereon.

The defendant expressly covenanted and agreed under cl 15 of the agreement that the construction of the house would be completed and be ready for delivery to the plaintiff within 18 calendar months from the date of the execution of the agreement, ie on or before 13 July 1980.

The plaintiff filed his writ on 15 January 1985 and even by that date the house was not ready. The plaintiff claims for specific performance of the agreement for the delivery of vacant possession of 'a complete house' at the housing estate and for liquidated damages under the same clause, cl 15 of the agreement, calculated from day to day at the rate of 8% pa on the purchase price from the date of the agreement (13 January 1979) to the date of judgment and subsequently to the date of actual completion and delivery of possession of the house. The plaintiff also claims special damages, and or alternatively damages for breach of contract, and costs.

The defendant filed its defence. And the plaintiff took out a summons to strike out the defence and for final judgment to be entered against the defendant for the reliefs claimed. For various reasons the hearing of the summons was postponed several times.

On the date of the hearing of the summons, counsel for the defendant conceded there was no defence to the claim but disputed the right of the plaintiff to specific performance, liquidated damages and special damages as claimed.

I shall now deal with the matter of specific performance first.

Messrs Hanafiah, Roslan & Mohamad were appointed out of court by debenture holder, United Asian Bank Bhd as receiver and manager of the property of the defendant company on 2 December 1986 pursuant to a debenture dated 17 March 1976. This appears from the affidavit (encl 29) of Mr Eapern Thomas, the agent of the receiver and manager of the defendant company. From the affidavit and the report of accounts of the defendant company attached to the affidavit, it appears that the defendant company will not be able to fulfil its contractual obligations made prior to the receivership; it would appear that the defendant company would be unable to complete the construction of the houses in the housing estate without further financial assistance. The defendant says that if specific performance is decreed it would be directed at the receiver and the receiver under s 183 of the Companies Act 1965 (Revised 1973) is personally responsible for debts incurred by him in the course of receivership and that would be an unfair burden on the receiver. Counsel for the defendant relies on the Scottish authority of *Macleod* v *Alexander Sutherland Ltd*[1] for this view.

Counsel for the plaintiff, however, relies on *Freevale Ltd* v *Metrostore (Holdings) Ltd & Anor*[2] to argue otherwise and the headnote reads:

> Where a limited company enters into a contract to sell land, thereby conferring on the purchaser an equitable interest in the land, the fact that the vendor company is placed in receivership by a debenture holder of the company prior to a completion of the contract does not destroy the purchaser's

equitable interest in the land under the contract and substitute for it a mere right to claim damages against the vendor company if the contract is not completed; instead the vendor company remains liable to complete the contract. Accordingly, the appointment of a receiver does not of itself afford the vendor company a defence to a claim by the purchaser for specific performance of the contract.

The plaintiff says that on the basis of this authority and the provisions of ss 11 and 21 of the Specific Relief Act 1950, specific performance should be decreed.

Does the appointment of a receiver in this case defeat a claim for specific performance of the present contract?

In the case of *Freevale Ltd*,[2] Donald Rattee QC sitting as deputy judge examined the Scottish case of *Macleod*[1] where 'a decree of implement' (the equivalent of a decree of specific performance) was requested for by Macleod ('pursuer') against Alexander Sutherland Ltd ('defenders'). The brief facts which appear at p 44 of *Macleod*[1] are as follows:

> In 1972 the pursuer sold the defenders an area of ground at Inverness on missives which provided, inter alia, that the defenders should perform certain specified building and construction work in relation to the ground. The work was never carried out. The pursuer raised an action seeking decree of implement and, failing implement, damages of £10,000. The defenders were a company incorporated under the Companies Act, and a receiver was appointed to the company in June 1974 by creditors holding a floating charge secured over the company's entire assets. The receiver accordingly had complete control over the company's assets. The defenders had ceased to trade in the sense that they were no longer carrying on a building business. They did not employ anyone who could carry out the work, nor did they own the necessary materials. They averted that it was impossible for them to perform their obligations to the pursuer.
>
> Section 17(4) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 provides that contracts undertaken by a company prior to the appointment of a receiver continue in force notwithstanding the appointment. Counsel for the pursuers submitted that it was no answer for a company which had undertaken contractual obligations to say that they no longer had the means of performing them. The defenders admitted that they were in breach of contract and were willing that decree should pass against them for payment of damages. The only question remaining at issue was whether the pursuer was entitled to decree of specific implement.

The Lord Ordinary, Lord Stott, refused to grant the decree of implement but granted decree for payment of damages. He said:

> It is plain that the defenders are not in a position to obtemper decree of specific implement through their directors as would normally be the position if the company were not in receivership. Counsel for the pursuer, however, submitted that the position was fundamentally the same, inasmuch as they would be able to act through the receiver. But the receiver is not in the position of a director. No doubt he is deemed to be the agent of the company in relation to its property, but his acts are not the acts of the company. They are his own acts and by s 17(2) of the Act he incurs personal liability on a contract entered into by him in the performance of his functions. It is true that, as counsel pointed out, he has a right to be indemnified out of the company's property, but whether that right is of practical value may be a question of circumstances, and in any event the fact remains that the primary liability rests on the receiver himself. Since ex hypothesi the responsibility for whatever is done in implement of the contract must in fact be done by the receiver, it seems to me to be out of the question to pronounce a decree ostensibly against the company, which would in effect result in the receiver either incurring personal liability or in his bearing the responsibility for contempt of court (whether his own or the company's). That consideration applies with all the greater force when I am asked to pronounce such a decree in an action in which the receiver is not a party.

Lord Stott reinforced his argument for the refusal to grant the decree; he said:

> It follows from what I said that decree in terms of the pursuer's first conclusion should not be granted and the argument for refusing it is reinforced, if one considers the position from the point of view of enforcement. The only sanction suggested by counsel for the pursuer for failure to obtemper such a decree against a limited company would be impossible of a monetary penalty, and counsel was unable to refer to any report of such having been done ... It would, I think, be inequitable to grant a decree ad factum praestandum against a company which can act only through the agency of a receiver and which, if the receiver should decline to act, would inevitably be in contempt of court in respect of an omission which they would be powerless to remedy. To pronounce such an order in a case in which the sanction of a monetary penalty would have to be imposed on defenders for a contempt which they have no means of purging except through the intervention of an agent whose actings they have no power to control, would not only be ineffective, but would as it seems to me, be unfair to the defenders and no doubt also to their creditors ...

Judge Rattee in *Freevale Ltd*[2] at p 499 has neatly encapsulated the essence and nuances of the legal principles of *Macleod*[1] in this passage:

> The facts, of course, in that case were that it was no longer physically possible for the company, which had become little more than a shell, it having ceased its business, to have complied with an order for specific performance to carry out the works required by the contract. The works could only have been carried out if the receiver, in exercise of his powers, had entered into some other obligations, contracts, be what they may, but some other arrangements whereby he or the company could acquire the means with which to perform the company's obligations under the contract, and the Lord Ordinary is saying, as I understand him in that passage I have just re-read, that that being so, the decree for specific performance could only have been complied with at the cost of the receiver himself undertaking some personal liability, and that, not surprisingly, the court would not impose.

Judge Rattee was of the view, however, that the facts in *Macleod*[1] took a long way from the problem that he had to deal with in the case before him. He said, inter alia:

If my order for specific performance is made in the present case there is no question of the receiver having to incur any personal liability as the only alternative to being in contempt of court. The land the subject matter of the contract remains in the company. There is no difficulty, prima facie, at any rate, in its being conveyed by the company acting through the receiver pursuant to an order for specific performance if made.

In our case it is not a simple case of a mere transfer of a plot of land. What needs to be transferred is a plot of land, lot 76, with a completely built house on it. At the moment there is an incomplete house standing on the land, one of 145 incompletely built houses in phase 1 of a housing estate which, according to the uncontradicted averment of the project co-ordinator of the defendant (in encl 15), is 75% completed. Financial assistance would certainly be needed to complete the house on lot 76. Now the defendant has had a long history of financial problems (see *Tengku Farid bin Tunku Hussain & Ors* v *United Asian Bank Bhd*[3]) and it has ceased operations on the housing estate. The defendant was placed under receivership by debenture holder United Asian Bank Bhd and it is clear from the uncontroverted averment of the agent of the receiver (in encl 29) that the defendant is unable to complete the construction of the housing units in the housing estate without further financial assistance. What the receiver would have to do if specific performance is ordered as prayed for, would be not merely effecting the transfer of lot 76 simpliciter but lot 76 with a complete house erected thereon and clearly a house fit for human habitation and approved by the proper authorities as fit for occupation. And that would entail the receiver having to employ a contractor or contractors to complete such house meaning the incurring of personal liability on the part of the receiver under s 183 of the Companies Act. Failure on the receiver's part to complete the plaintiff's house, which in effect means failure on the receiver's part to incur personal liability, would open the receiver to being in contempt of court and it would be wrong for the court to order specific performance in the circumstances.

Even if I am wrong in adopting the principle in *Macleod*[1] and applying it to the facts of the present case, I am of the view that the facts show that the contract cannot be specifically enforced as the court will not be able to superintend the works required to complete the house. I have in mind s 20(1)(b) of the Specific Relief Act 1950 (Act 137).

The subject matter of the contract is a house on a lot of land in a housing estate. The house is not completely built as yet. The lot, however, forms part of the overall development of the housing estate. To enforce the completion of a house on this one lot of land in the estate comprising 145 incompletely built houses would be to ignore the massive building works which would have to be carried out in the incompletely built housing estate. It is futile merely to order the completion of the house on lot 76 and the transfer of the property to the plaintiff; all that he would get would be the shell of a house, not fit for human habitation and of no commercial value so long as the housing estate remains uncompleted. According to uncontroverted evidence in the affidavit (encl 15) of the project co-ordinator of the defendant, the housing estate is completed to the extent of 75%. The court is not aware where this one lot of land stands in the housing estate but wherever it is situated it is unarguable that the basic infrastructure of the housing estate would have to be completed in tandem with the completion of the house on the lot; the basic infrastructure relating to the supply of electricity and water, to the laying down of a sewage system and a drainage system, roads etc would have to be laid before the house can be connected to these basic amenities; and the evidence is that the access road has not been approved for the estate. These are numerous and minute details relating to the works to be carried out which need the supervision of the court and clearly the court will be in no position so to do.

Again from the nature of the contract, bearing in mind that the lot with the house to be completed on it is intimately tied to the other 144 incompletely built houses on the housing estate with an incompletely built infrastructure, various approvals would have to be sought from relevant authorities in regard to the access road to the housing estate, the supply of water, the supply of electricity, the sewage mains, the drainage systems etc to the housing estate. There is also the important question of obtaining a certificate of fitness for occupation for that single house. These are approvals which the defendant would have to seek and there is no way the court can safely say the approvals would be granted; from the very nature of these matters the court would not be able to enforce an order that a completely built house be transferred to him if such an order is given.

To my mind the remedy lies in damages for breach of contract.

In the circumstances, on the defendant conceding that there is no defence to the plaintiff's claim, the plaintiff succeeds in his claim with costs, save that I hold that this is not a proper case for granting specific performance. In my view damages should provide adequate remedy and I shall hear arguments as regards the quantum of damages to be awarded.

Order accordingly.

Solicitors: *Gill & Tang*; *TH Su & Co.*

Reported by *Wong Kim Fatt*